No. 92-515 (40)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF OHIO IN SUPPORT OF RESPONDENT

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31 (A)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

I. INTEREST OF *AMICUS*[1]

The American Civil Liberties Union of Ohio ["ACLU of Ohio"] is an affiliate of the American Civil Liberties Union ["National ACLU"], a nonprofit, nonpartisan organization, whose thousands of members are dedicated to the principles of liberty and equality embodied in the Bill of Rights.

Since their founding in 1920, the Ohio and National ACLUs have been zealous advocates of the First Amendment and steadfastly have opposed government efforts to regulate free speech and thought, no matter how well intentioned those efforts might be. This commitment to free speech has led both the Ohio and National ACLUs to defend numerous clients whose political ideologies are abhorrent to most members of the organizations. We have done so, nonetheless, because of our belief that civil liberties are indivisible, and that free speech rights cannot be granted to some and denied to others. For these reasons, the ACLU of Ohio successfully has challenged the Ohio ethnic intimidation statute as unconstitutional on its face. *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992), *petition for cert. filed* (No. 92-568).

The ACLU's commitment to free speech has always stood side-by-side with a commitment to equal protection of the laws. Thus, throughout their history, the Ohio and National ACLUs consistently have argued in this and other courts in favor of antidiscrimination laws. However, there are times when the reconciliation of conflicting values of freedom of expression and equal protection is very difficult—and individuals and organizations may, in good faith, differ on that resolution.

The National ACLU has filed an *amicus* brief arguing that reversal of the Supreme Court of Wisconsin's decision is consistent with First Amendment principles. The ACLU of Ohio, by vote of its Board of Directors, has concluded that the National ACLU has accorded insufficient weight to First Amendment values. The ACLU

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

of Ohio urges the Court to affirm the judgment of the Supreme Court of Wisconsin. We believe that Todd Mitchell was punished for *acting* on his beliefs when he received the first two years of his sentence, and when he was given an additional two years, he was punished for his thoughts (and words) themselves. Because this case raises such fundamental and profound constitutional issues, we submit this brief as *amicus curiae* to offer the Court the benefit of our views.

II. STATEMENT OF THE CASE

On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha, Wisconsin. Nineteen-year-old Todd Mitchell was one of the older members of the group. Some of the group were at one point discussing a scene from the film "Mississippi Burning," where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.

The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. Other than the words he used to exhort his friends, there is no indication that Mitchell participated in the beating. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates that he suffered extensive injuries, including possible brain damage.

Mitchell was convicted of aggravated battery, party to a crime under WIS. STAT. §§ 939.05 and 940.19(1m) (1982). The jury separately found that Mitchell had intentionally selected Reddick as

the battery victim because of Reddick's race. The aggravated battery conviction carried a maximum sentence of two years. Because the jury found that Mitchell had selected Reddick because of Reddick's race, the hate crime statute, WIS. STAT. § 939.645, increased the potential maximum sentence for aggravated battery to seven years. The trial court sentenced Mitchell to four years for the aggravated battery.

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crime statute. On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crime statute was neither vague nor overbroad. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991).

The Wisconsin Supreme Court granted Mitchell's petition for review on the issue of the constitutionality of the hate crime statute. On June 23, 1992, the court reversed the decision of the state appellate court and held that the statute was unconstitutional. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992). This Court granted the State of Wisconsin's petition for a writ of certiorari on December 14, 1992.

III. SUMMARY OF ARGUMENT

Few issues in recent times have engendered more division among members of the so-called liberal community than those surrounding "hate crime" legislation. Such laws, of which WIS. STAT. §939.645 (1989-90)["the statute" or "the hate crime law"] is an exemplar, were enacted in response to reports that prejudice-related crimes were increasing. The purpose underlying these laws is a noble one which groups such as the ACLU of Ohio have long embraced: the prevention of crimes perpetrated against members of disadvantaged groups solely because of their immutable characteristics or their beliefs. It is the means chosen to achieve this goal which have shattered typical liberal alliances, leading to anomalies such as that extant in the ACLU of Ohio filing this brief urging affirmance of the

Wisconsin Supreme Court, at the same time that the National ACLU has filed a brief on the opposite side. *See* Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioner [hereinafter "National ACLU Brief at ____"].

The members of the ACLU of Ohio feel no less strongly than our associates at the National ACLU that crimes perpetrated against minorities and other disadvantaged groups are reprehensible and should be severely punished. However, we diverge from the national organization because of our belief, borne out by experience with Ohio's recently invalidated ethnic intimidation statute, that laws such as Wisconsin's are conceptually infirm at their root: they seek to prevent harms to certain groups indirectly, via the mind and words of the alleged perpetrator. In the view of the ACLU of Ohio, such a "detour" is not constitutionally permissible, particularly in light of the fact that the conduct which is properly the object of state sanctions is already punished under generally applicable laws.

The State and its *amici* seek to persuade this Court that the hate crime law punishes conduct, the "act" of intentionally selecting a victim because of one of the forbidden criteria. However, this is no more an "act" than is the decision to purchase a particular item of apparel from a clothier: the actual purchase is the part of the transaction which might be characterized as an act, while the "selection" of the garment is shorthand for a complex variety of mental processes that have few outward, reliable manifestations. The Wisconsin Supreme Court correctly concluded that the hate crime law, with its focus on the defendant's "intentional selection," necessarily involves inquiry into, and punishment of, his subjective motives or reasons for singling out the object of criminal conduct.

Such motivating thoughts may not be punished separately by the State. First, motive, defined as the reason "why" an individual engages in specific conduct, is difficult if not impossible to ascertain in a manner reliable enough to support the imposition of harsh criminal penalties. The second reason why motive may not be separately punished by the government stems from the First Amendment itself: government may not selectively punish those motivating beliefs of which it approves and ignore others. For example, if Wisconsin may increase the penalty for only those batteries in which

the perpetrator selected his victim because of that person's religion, then it could just as properly choose to eliminate the penalty for those batteries which were motivated by the religion of the victim. If this selection among motivating beliefs is deemed to be a proper function of government, it is not difficult to envision how hate crime statutes could be used to suppress unpopular viewpoints.

However, even if the hate crime law is deemed to reach conduct rather than thoughts and beliefs, it is unconstitutionally overbroad. The statute, which elevates the criminal penalty for virtually every act of criminal conduct when it is prompted by "improper" motives, sweeps within its ambit a great deal of protected activity and therefore should not be sustained.

Finally, in urging reversal of the Wisconsin decision, the State and its *amici* contend that unless the hate crime law is upheld, the panoply of state and federal antidiscrimination statutes will be threatened with invalidation. This argument is not well taken for several reasons. First, it is hardly a sound principle of constitutional adjudication to base determinations about the constitutionality of one statute on the possible effect its invalidation will have on other statutes not under consideration by the Court. Moreover, the concerns voiced by the proponents of the hate crime law are unrealistic because none of the laws which they contend are jeopardized by this case levy criminal penalties on motive itself, distinct from the underlying conduct sought to be discouraged. The only situations in which conventional antidiscrimination laws consider motive at all are those in which there is an essential nexus between motive and the conduct sought to be prohibited. No such nexus is found in the hate crime law since the underlying conduct, by definition, is already punished regardless of whether the state approves of the actor's motive. Consequently, invalidation of the hate crime law will not result in the wholesale loss of state and federal antidiscimination statutes.

IV. ARGUMENT

A. The First Amendment Prevents Government from Imposing Substantial Criminal Penalties Solely on Motives, Where the Ends Sought to be Achieved May be Accomplished Through the Less Restrictive Means of Punishing Conduct.

1. The Wisconsin hate crime law punishes thought and speech, not conduct.

The Wisconsin Supreme Court correctly concluded that the hate crime law, Wis. Stat. § 939.645(1)(b), implicates and infringes on First Amendment protections of thought and speech. The court construed the statute as reaching, not action, but the thoughts and accompanying expression which comprise a perpetrator's "subjective motivation" in the selection of a particular person against whom criminal conduct is carried out. *State v. Mitchell*, 485 N.W.2d 807, 814 (Wis. 1992). In simple terms, the *Mitchell* court held that the "hate crime" law was invalid because, while the state can and should punish "crime," *i.e.*, the underlying injurious conduct, it cannot separately punish "hate," namely, the evil feelings which motivated the perpetrator to act against a member of a particular group.

The focal point of the Petitioner's attack on the decision below is the court's conclusion that the statute sanctions thought and speech. The State contends that the hate crime law punishes not belief and expression, but conduct which has a "dual nature," consisting of "criminal conduct" combined with "the discriminatory motive of the actor" in selecting a particular victim. Brief of Petitioner at 8. Thus, Wisconsin argues, this case is not governed by *R.A.V. v. City of St. Paul*, 505 U.S. ___, 112 S. Ct. 2538 (1992), because the ordinance at issue there proscribed expression based on content, whereas the hate crime law "does not on its face, or in effect, proscribe expression, beliefs, or thought." Brief of Petitioner at 10.

However, as the Wisconsin Supreme Court noted, by punishing the mental processes underlying the defendant's intentional selection of a target for illegal actions, the statute proscribes the

motive or reason behind the selection—in short, the thoughts and beliefs that impelled the defendant to act. *Mitchell*, 485 N.W.2d at 812. Indeed, if we compare the expressive conduct of the defendant in *R.A.V.* to the "conduct" for which Mitchell is being punished, Mitchell's is far more akin to speech. Mitchell did not engage in the beating of the white victim; his involvement consisted of discussing the film "Mississippi Burning," and his admonition to his cohorts to "move on some white people" and to "go get [a white boy.]" *Id.* at 809. Mitchell received a two-year sentence for uttering these words, and an additional two years under the hate crime law solely for the bigoted thoughts which impelled him to speak. By contrast, the defendant in *R.A.V.* actually burned a crudely-made cross inside the fenced yard of a black family. 112 S. Ct. at 2541. Although the City of St. Paul in *R.A.V.* conceded that the burning of a cross does express a message, *Id.* at 2548, surely the defendant's actions in that case were much closer to conduct than were the thoughts and words for which Mitchell was punished. Thus, the efforts of the State and its *amici* to distinguish *R.A.V.* by asserting that it dealt with speech, while this statute clearly punishes "criminal conduct," *e.g.*, Brief of Petitioner at 7, are unpersuasive.

The Ohio Supreme Court rejected a similar argument in *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992), *petition for cert. filed* (No. 92-568), a decision overturning Ohio's ethnic intimidation statute[2] on state and federal constitutional grounds. It was *Wyant*, and the other cases with which it was consolidated, which initially demonstrated to the members of the ACLU of Ohio the dangers to civil liberties posed by hate crime statutes. In *Wyant*, the white defendant became involved in a verbal dispute with a group of blacks at a state park. After being asked by park officials to turn down his radio, Wyant was heard to say, "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black motherfucker," and "I ought

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[2] Ohio's ethnic intimidation statute enhanced the penalty for various specified criminal actions done "by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code Ann. § 2927.12 (Anderson 1987). Wisconsin's statute, by contrast, enhances criminal penalties for certain actions where the actor "intentionally selects" the person or property against whom the crime is committed "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of that person or the owner of the relevant property. Wis. Stat. § 939.645 (1989-90).

to kick his black ass." *Id.* He was indicted and convicted on one count of ethnic intimidation, predicated on the less serious crime of aggravated menacing, and sentenced to eighteen months imprisonment. *Id.*

In *Wyant*, the State of Ohio argued, precisely as Wisconsin does here, that the hate crime statute punished conduct, since its enhancement provision was triggered only after the defendant had been impelled to carry out a criminal act against another. The court unanimously rejected this contention, noting that "the enhanced penalty results solely from the actor's reason for acting, or his motive." *Id.* at 453. In a carefully reasoned opinion, the court concluded that the punishment of motive separately from the underlying acts which are already proscribed violates the expressive freedoms guaranteed by the Ohio and United States constitutions:

> The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes. The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.
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> . . .
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> By enacting [the hate crime statute] the state has infringed on [the] basic libert[ies of thought and speech]. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?

Id. at 457 (footnote omitted).

The Wisconsin statute is worded differently than the Ohio law invalidated in *Wyant* inasmuch as it punishes the "intentional selection" of a person or property against whom a crime is committed because of the race, etc., of the victim or the owner of the property. However, the Wisconsin hate crime law unquestionably criminalizes

the thoughts and motives of a person who has engaged in otherwise proscribed conduct. The Wisconsin Supreme Court construed the hate crime law as "punishing offensive motive or thought," since an examination of the intentional "selection" of a victim "necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." *Mitchell*, 485 N.W.2d at 813. Indeed, the State and its *amici* concede as much but argue that motive may properly be singled out for distinctive punishment by the legislature once the motive prompts a person to engage in proscribed conduct.

The argument advanced by the National ACLU in its *amicus* brief is typical of this reasoning (though not, we believe, of the libertarian principles traditionally championed by the ACLU):

> Respondent is facing an additional two years in prison because he deliberately chose the victim of his assault on the basis of race. *Until he engaged in this discriminatory behavior, respondent was free to think and say whatever he wished.* Once he engaged in this discriminatory behavior, respondent crossed a crucial constitutional line.

National ACLU Brief at 8 (citations omitted)(emphasis supplied).

This Court has never suggested that a person's freedom to think and say whatever he wishes disappears once the "crucial constitutional line" of "discriminatory behavior" is crossed. Even bigots who are so benighted as to act on their loathsome beliefs do not thereby forfeit the protections of the First Amendment. Thought and speech do not lose their constitutionally preferred status because one, at the same time, has participated in conduct that is itself unprotected. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908-17 (1982) (right to associate does not lose constitutional protection because some members of the group may have engaged in violent conduct, though violence itself can be punished). Prisoners who have been duly convicted of the most heinous crimes and incarcerated in prison retain all First Amendment freedoms that are not incompatible with imprisonment. *Bell v. Wolfish*, 441 U.S. 520, 545 (1978); *Pell v. Procunier*, 417 U.S. 817, 822 (1973).

The State seeks to avoid the implications of these principles by arguing that discriminatory motive is really a type of "conduct," rather than thought or speech. According to this argument, the criminal law is constantly engaged in evaluating and punishing the motive which impels individuals to act, and the First Amendment does not affect these inquiries. However, motive, as distinct from intent and purpose which affect the nature of the criminal act itself, is not properly a subject of criminal sanctions. WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.6 (2d ed. 1986) (narrowly defined to exclude "intent" and "purpose," "motive" is not relevant to substantive criminal law).[3] This is true for at least two reasons.

First, motive, defined as the reason "why" a person engages in specific conduct, is difficult or impossible to ascertain in any reliable way. This problem is apparent even in the arguments advanced by those who support the statute. For instance, the National ACLU suggests that it is neither fruitful nor necessary to make murky inquiries into motive because Mitchell's reasons for acting remain a mystery. National ACLU Brief at 12. According to the National ACLU, Mitchell may have "used racial rhetoric" to spur others on out of a desire to steal Reddick's tennis shoes, not out of "genuine racist feeling." *Id.* It then argues that this uncertainty is not significant because all that need be shown to establish a violation of the hate crime law "was that Mitchell acted on the basis of race." This is a non sequitur. If Mitchell could have established that his motive was not racial animus, then he would not have violated the hate crime law: his selection of Reddick would not have been "because of the race . . . of that person," but "because of the tennis shoes" of that person.

[3] The distinction between motive, purpose, and intent is explained by Professors LaFave and Scott as follows:

> [I]t is undoubtedly better, for purposes of analysis, to view [specific intent] crimes as *not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when A breaks into B's house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive.

WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 3.6 at 228 (2d ed. 1986).

Members of this Court have long recognized the difficulties inherent in making determinations about motive, even within the context of reasoned legislative debate. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court considered whether Congress, in amending the Universal Military and Training and Service Act of 1948, to prohibit the knowing destruction or mutilation of draft cards, had acted with a desire to suppress free expression. There were indications that at least some legislators may have been motivated by a desire to stem the "defiant" destruction of the draft cards and the open encouragement of others to do the same. *Id.* at 385-86. However, the Court refused to inquire into the legislature's motives in passing the amendments:

> Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 384. *See also Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. and Rehnquist, C.J., dissenting) (criticizing prong of *Lemon* test which evaluates legislative purpose because "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task"). Surely, with two years of his life on the line, the stakes for Mitchell are high enough that the State must eschew imposing criminal penalties on him because of guesswork about whether he selected Reddick on the basis of race or the brand of tennis shoes Reddick was wearing.

The second reason why motive may not be separately punished by the government has a constitutional basis: the First Amendment prevents the government from selectively punishing some motivating beliefs and not others. As Justice Scalia wrote in *R.A.V.*, a criminal statute designed solely to display the government's "special hostility towards the particular biases thus singled out" is "precisely what the First Amendment forbids." 112 S. Ct. at 2550 (footnote omitted). If the government were not required to maintain a posture of epistemological humility with respect to even the most repulsive motivating beliefs, unpopular views could be effectively

suppressed. For instance, if Wisconsin may increase the penalty for batteries in which the perpetrator selected his victim because of that person's religion, then it may also *mitigate or eliminate* the penalty for batteries in which the perpetrator selected his victim because of that person's religion. In principle, the statutes would be equivalent, the only difference being the legislature's perspective on which motives for battery are most acceptable. If it is deemed proper for government to select among those motivating beliefs which it desires to punish the most heavily, the First Amendment, in many respects, will have ceased to function as a protection against the government prescribing orthodoxy of thought.

This Court has refused to permit the government to impose penalties solely on disapproved motives. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court declared the Texas flag desecration law unconstitutional because it punished conduct only when it was done to offend others, in other words, when it was prompted by improper motives. Congress attempted to overcome this problem by passing the Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. 1992), which purported to proscribe conduct "without regard to the actor's motive." *United States v. Eichman*, 496 U.S. 310, 315 (1990). But the Court rejected the new federal law as well on First Amendment grounds. The Court noted that, with the possible exception of "burns," the terms for the so-called "conduct" that was prohibited— "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples"— "unmistakably connote disrespectful treatment of the flag." *Id.* at 317. The Act failed to pass constitutional muster because it penalized the actor's beliefs and motives, in violation of the First Amendment.

In essence, the State and its *amici* invite this Court to hold that once certain proscribed conduct occurs, the line between actions and beliefs disappears and the government may delve into and separately punish whatever motives are determined to have prompted the conduct. That is obviously why the State, in prosecuting this action, offered evidence that Mitchell and his friends had been watching the film "Mississippi Burning" and had discussed a scene in which a white man beat a young black boy who was praying. *Mitchell*, 485 N.W.2d at 809. By the same reasoning, it also would have been relevant to Mitchell's prosecution that he had gone to see the film

"Malcolm X" the day or week before, or that he had repeatedly expressed the opinion that only through violence would blacks ever achieve equality in a racist society. Once the distinction between thought and conduct disappears, there is no principled stopping point.

In its *amicus* brief, the National ACLU acknowledges these obvious dangers to thought and expression posed by the Wisconsin hate crime statute. It admits that the statute is "easily susceptible to prosecutorial abuse," and may become "a vehicle for the suppression of unpopular ideas." National ACLU Brief at 20. Thus, although the National ACLU ostensively defends the Wisconsin statute as it is written, it actually urges this Court to reinstate a modified version of the hate crime law, engrafted with extensive constitutional caveats and guidelines designed to limit the evidence that could be used in prosecuting hate crime violations. *Id.* at 20-23.

What the National ACLU fails to recognize is that, once it is established that motivating beliefs may be singled out for punishment consistent with the First Amendment, it is arguably not "abuse," but proper *diligence* for a prosecutor to offer evidence of the defendant's racist associations or reading habits. If hate crime laws are constitutional, prosecutors and law enforcement officials would have a responsibility to inquire into all evidence that pertains to whether the victim of particular conduct was intentionally selected because of that person's race or religion. In the instant case, it is a film viewed by the defendant that the state seeks to consider in punishing him. Unless the First Amendment prevents such governmental action, there is no reason why, in the next case, the prosecution would not evaluate the defendant's library, associations, or writings.

In the view of the ACLU of Ohio, the First Amendment permits Mitchell to be punished for his actions, but not for his bigoted, motivating thoughts. The "crucial constitutional line" correctly recognized by the Wisconsin Supreme Court is the line dividing conduct from motivating thoughts and beliefs, which are not proper objects of governmental sanctions. We urge this Court to reaffirm this vital distinction.

2. The Wisconsin hate crime law is not narrowly tailored to further a compelling governmental interest.

The relevant standard of review in this case depends on the nature of the interest regulated by the state. As the preceding section indicates, the Wisconsin Supreme Court correctly construed the hate crime law as being "expressly aimed at the bigoted bias of the actor." *Mitchell*, 485 N.W.2d at 813. Moreover, this Court has indicated that it considers itself bound by the authoritative construction of a state supreme court concerning the reach of a state statute. *R.A.V.*, 112 S. Ct. 2538, 2542 (1992). Thus, the importance of Wisconsin's interest, and the extent to which the hate crime law furthers that interest, must be subjected to "the most exacting scrutiny."[4] *Texas v. Johnson*, 491 U.S. 397, 412 (1989). Typically, strict scrutiny is characterized as looking at whether the statute is narrowly tailored to further a compelling governmental interest.

There are several interests that are conceivably advanced by the hate crime law. First, there is the interest identified by the Wisconsin Supreme Court: "[t]he statute commendably is designed to punish—and thereby deter—racism and other objectionable bi-

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[4] Wisconsin may not avoid the operation of strict scrutiny by arguing that the hate crime law only incidentally regulates thought and expression, thereby satisfying the less stringent standard of *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, this Court held that a substantial governmental interest in regulating conduct can justify "incidental" limitations on First Amendment freedoms, as long as the state interest is unrelated to the suppression of expression and the restriction is no greater than is necessary to further that interest. *Id.* at 376-77. Thus, O'Brien could be punished for burning his draft card, even though he had burned it in order to express his displeasure with the war in Vietnam, because the aim of the statute was to ensure the smooth operation of the selective service system, not to suppress anti-war protests.

In the instant case, Mitchell's prosecution for battery is analogous to the prosecution at issue in *O'Brien*. Because of *O'Brien*, Mitchell cannot claim exemption from the state's battery law because it incidentally results in his being punished for his words urging violence against Reddick. However the hate crime statute is directly aimed at something more than conduct: the thoughts which prompted Mitchell to act. Thus, the governmental interest is in promoting certain thoughts and beliefs about race and the *O'Brien* test does not apply. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

ases." *Mitchell*, 485 N.W.2d at 814. Plainly, as the Wisconsin court ultimately concluded, *Id.*, that state interest is an impermissible one since government may not mandate one view of racial relations and punish others. *R.A.V.*, 112 S. Ct. at 2550; *see also Texas v. Johnson*, 491 U.S. at 415. As Judge Easterbrook noted in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), "[a]ny other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."

The State of Wisconsin recasts this interest slightly when it argues that it must also impose additional penalties in order to deter the "actual degree of depravity" of Mitchell's crime. Brief of Petitioner at 21. According to the State, Mitchell's crime was "doubly depraved:" it was wrong as an act of violence and "additionally wrong as a violent act of discrimination." *Id.* However, examination of this interest reveals that it is merely viewpoint discrimination in another form. Mitchell's discriminatory motive was "depraved" because of Wisconsin's attitude toward racial bigotry. If Mitchell had battered Reddick's sister because of her gender, a category omitted from the hate crime statute, no such "double depravity" would have been present and Mitchell could only have been punished for his act of violence. The "depravity" Wisconsin seeks to punish thus stems solely from governmental hostility toward particular racist views, an interest that is not permissible under the First Amendment.

Finally, the most defensible interest which the State might assert, and one implicit in all discussions of hate crime statutes, is that of prohibiting crimes against members of groups which have historically, and are presently, frequent targets of violent conduct. Since African-Americans, Jews, and other minorities in this country have often been singled out for attacks by violent bigots, the State may be presumed to have a compelling interest in preventing crimes against these groups. However, the hate crime law is not narrowly tailored to advance such an interest.

The hate crime law only indirectly reaches attacks on particularly vulnerable victims: the statute's primary prohibition is against bigoted motives. As the instant case illustrates, the statute may be employed as readily *against* members of traditionally disadvantaged

groups as on their behalf. What we have here, as this Court noted in *R.A.V.*, is not a prohibition against conduct that is "directed against certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause);" but rather a prohibition against " 'bias-motivated' hatred." that leads to conduct. 112 S. Ct. at 2548. Because the state's interest in preventing violent acts against vulnerable persons or groups could be directly advanced by a content-neutral statute focusing on conduct, the state may not attempt to advance this interest indirectly, by punishing the bigoted thoughts motivating that conduct.

3. The Wisconsin hate crime law is unconstitutionally overbroad because it reaches a substantial amount of protected expressive conduct and could readily be used to silence unpopular viewpoints.

A law is unconstitutionally overbroad when it "does not aim specifically at evils within the allowable area of governmental control, but . . . sweeps within its ambit other activities that constitute an exercise of protected expression or associational rights." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Obviously, the ACLU of Ohio considers the hate crime law to be panoramically overbroad because we believe that it aims at punishing bigoted motives and beliefs, which are protected under the First Amendment. However, even if one were to conclude that the statute reaches conduct rather than thought and expression, the statute still would proscribe a substantial amount of protected activity.

The hate crime law elevates the penalty for practically every offense in the Wisconsin Criminal Code, from "criminal trespass," WIS. STAT. § 943.13 (1982), to "adultery," WIS. STAT. § 944.16 (1982). Thus, the statute creates a de facto anti-miscegenation statute by increasing by up to $5,000 and five years imprisonment the criminal penalty for engaging in sexual intercourse with a married person "because of" the race or color of that person (there is no requirement under the statute that race be the sole, or even predominant motive). WIS. STAT. §§ 939.645 (1989-90) and 944.16 (1982). *C.f. Loving v. Virginia*, 388 U.S. 1 (1967) (striking down anti-miscegenation statute on equal protection grounds).

Likewise, the hate crime law readily could be applied to trespassing protesters who happened to have selected the site of their march because of one of the proscribed categories of motivations. For example, gay activists or pro-choice marchers who selected a particular Milwaukee Cathedral in order to protest the Catholic Church's teachings pertaining to homosexuals or abortions could have their criminal trespass penalties enhanced by up to $10,000, and one year imprisonment under the hate crime law, since they selected the property on which they trespassed because of the religion of the owner.

To consider the hate crime law in a historical context, if a version of the Wisconsin statute had been in effect in the segregated South during the Civil Rights movement, those who marched for integration and equality would have suffered even greater hardships. Certainly, penalties imposed on civil rights marchers could have been enhanced in most instances, since it would not have been difficult for authorities to show that protesters were motivated by the race, religion, or the political beliefs of their "victims."

These are only a few examples of the protected conduct which the hate crime law potentially reaches and thereby "chills." If Wisconsin wishes to legislate in sensitive areas pertaining to bigotry, it must do so thoughtfully and carefully, taking care not to punish or dissuade protected activities. The hate crime law is far too imprecise to accomplish this delicate task.

B. Invalidation of the Wisconsin Hate Crime Law Will Not Call into Question Federal and State Antidiscrimination Laws, Which Employ Narrowly Tailored Means to Prevent Discrimination in the Marketplace.

Although it is evident that the Wisconsin statute is constitutionally impermissible on First Amendment grounds, one of the arguments urged most strenuously by the State and its *amici* is that, if the hate crime law is found unconstitutional, a host of state and federal antidiscrimination laws would also be invalidated. The argument that the Wisconsin hate crime law must be upheld lest the legion of federal and state antidiscrimination laws also fail is problematic at best.

Deciding the constitutionality of the statute based on the possible unconstitutionality of other statutes not before this Court is a questionable fundament. Nonetheless, because of the prevalence of concerns about the continuing validity of antidiscrimination laws in the wake of *Mitchell*,[5] the merits of such concerns will be addressed.

1. Antidiscrimination laws are narrowly tailored to prohibit objectively identifiable acts of discrimination, while the hate crime law punishes discriminatory motive.

The *Mitchell* majority correctly concluded that the hate crime law was invalid because it punishes the mental processes and thoughts of the alleged perpetrator. 485 N.W.2d at 817. In contrast, antidiscrimination laws target and prohibit the discriminatory act. *Id.* In *State v. Wyant*, the Ohio Supreme Court elaborated on this distinction. Justice Brown conceded that federal and state laws against discrimination in employment, housing, education, and other areas do proscribe acts committed with a discriminatory motive. 597 N.E.2d at 456. Nonetheless, he found that, because the *act* of discrimination is targeted by antidiscrimination laws, not the motive of the actor, these laws analytically are distinct from hate crime statutes. *Id.* Indeed, "[i]t is the discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*" of the perpetrator which is targeted. *Id.*

As this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), regarding Title VII protections against discriminatory employment practices, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (emphasis in original). Bigoted motivation itself is not punished by antidiscrimination statutes as it is by the Wisconsin hate crime law. Nor does proof of motivation enhance the penalty under antidiscrimination laws when a discriminatory act is manifest. Rather the *act* of discrimination identified through objectively verifiable conduct, not the disfavored thoughts of the actor, is proscribed and penalized.

Antidiscrimination laws focus on the denial of an opportunity for housing, employment, or education, rather than the discriminatory motive of the actor. The nexus between the regulated conduct and discriminatory motive under these laws is so tight as to nearly merge the motive into the act and make the two interdependent, in order to create *any* illegality. In other words, the motive is essential to make an otherwise neutral act punishable. *See generally,* Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 1991 BROOKLYN L.REV. 1107, 1139-40. The only way for government to reach the underlying neutral act of denying housing, employment, or education is to couple the act with a discriminatory motive, in which case the two elements become inextricably combined. The tight nexus between the motive and the objectively verifiable conduct underlies the validity of these laws.

The redressability of conduct that is coupled with a discriminatory motive under antidiscrimination laws is akin to situations arising under the rule of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, the government may regulate conduct while only incidentally limiting First Amendment interests, so long as the state's interest is "unrelated to the suppression" of expression. *Id.* at 377. Because the state interest underlying antidiscrimination laws is to remedy the effects of past discrimination in the marketplace felt by traditionally disadvantaged groups,[6] not to suppress expression, the state can punish these acts, while only incidentally touching the discriminatory motive or thought of the actor.

The only way to reach invidious discrimination in the marketplace is through the narrowly tailored means of punishing the conduct that is accompanied by a discriminatory motive. While discriminatory motive is essential to making the act of denying employment, housing, or education punishable, the intrusion on the expressive element of such conduct is only slight, and it is the denial of

[5] In *Mitchell*, Justice Bablitch posed the question, "How can the Constitution not protect discrimination in the marketplace when the action is taken 'because of' the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken 'because of' the victim's status?" *State v. Mitchell*, 485 N.W.2d 807, 820 (Wis. 1992) (Bablitch, J., dissenting).

[6] *See* Brief of Petitioner at 31 where the State concedes that antidiscrimination laws are primarily remedial in nature.

opportunity that is redressed by these statutes, rather than the motives of the actor. This is permissible because no adequate content-neutral civil alternatives exist for remedying discrimination in the workplace, housing market, or educational institution. *See R.A.V. v. City of St. Paul*, 505 U.S. ___, 112 S. Ct. 2538, 2550 (1992).

The Wisconsin hate crime law, however, is not narrowly tailored to serve what would seem to be the State's most compelling interest: preventing harmful actions against historically disfavored persons or groups. Wisconsin seeks to advance this interest indirectly, by punishing the discriminatory motive, or hate, of the alleged perpetrator. Such a detour through the mind or words of another is constitutionally impermissible in view of the fact that the underlying conduct is already punishable under content-neutral criminal laws.

Unlike antidiscrimination laws, where the nexus between motive and act is so tight as to make the two interdependent in order to create *any* illegality, the nexus under the hate crime law is much more distant. Indeed, the alleged perpetrator of a hate crime can properly be punished for his actions alone under the content-neutral criminal statute, without reaching discriminatory motive. The existence of an independent discriminatory motive is not essential to the punishability of the underlying conduct. By contrast, the punishment of discrimination in the marketplace depends on a close fit between motive and otherwise lawful conduct.[7]

The State has in place content-neutral criminal codes that already proscribe the behavior targeted by the hate crime law; thus it is difficult to delineate any special interest fostered by the hate crime statute. The criminal codes, which are not limited to the favored factors, achieve the beneficial result of preventing the proscribed conduct. *See R.A.V.*, 112 S.Ct. at 2550. Indeed, "the only interest distinctly served by the content limitation [of the Wisconsin statute] is that of displaying [the State's] special hostility towards the particular biases thus singled out." *Id.* Such a result is precisely what the First Amendment forbids. *Id.*

[7] The State's *amici* dismiss the fact that existing content-neutral laws already address the behavior targeted by the hate crime law by inexplicably asserting, "[t]he fact that assaults are otherwise prohibited should increase the state's concern with discrimination rather than diminish it." National ACLU Brief at 11.

Discriminatory motive does not play the same role in antidiscrimination laws as it does in the Wisconsin statute. Nonetheless, the State and its *amici* cite several antidiscrimination laws which they suggest are functional equivalents of the hate crime law. The problems with equating these laws are apparent when analyzing the proof of discriminatory motive, for instance, under laws prohibiting discriminatory employment practices.

As the Ohio Supreme Court noted in *Wyant*, two theories are used under employment discrimination laws to prove the fact of discriminatory conduct: the "disparate-impact" theory and the "disparate-treatment" theory. 597 N.E.2d at 456. Under a disparate-impact analysis, evidence that an employment practice is neutral on its face, but falls more harshly on a protected group, can be used to show the fact of employment discrimination. *Id.* Indeed, no discriminatory motive is necessary to prove that an employer violated Title VII, 42 U.S.C. § 2000e-2(a)(1) (1981), which prohibits the hiring or firing of individuals "because of . . . race, color, religion, sex, or national origin." *See Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("[p]roof of discriminatory motive, we have held, is not required under a disparate impact theory"). A prima facie violation may be shown by "employment policies that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Id.* at 349. The disparate impact is not employed to infer the discriminatory motive of the employer; instead, it shows that the act of discrimination punished under the statute is equally possible without any motive truly related to bias. In other words, an employer may like blacks personally, but if employment practices statistically show that blacks are given far fewer promotions than whites, the employer is liable under 42 U.S.C. § 2000e-2(a)(1).

The disparate-impact analysis sharply contrasts with the proof of discriminatory motive required under the Wisconsin hate crime law. Whereas 42 U.S.C. § 2000e-2(a)(1) punishes employment discrimination whether or not it is motivated by discriminatory animus, the Wisconsin statute requires the proof of a defendant's bigoted motives or thoughts (often through the defendant's spoken word) and penalizes his otherwise punishable criminal act *more harshly* when it is so motivated.

A closer analogue to the hate crime law is found in disparate-treatment theories of discrimination; yet these, too, are distinguishable. Under the disparate-treatment analysis, an employer may not treat some groups less favorably than others because of race, color, religion, sex, or national origin. Admittedly, proof of discriminatory motive is necessary to this theory. However, proof of discriminatory motive can be inferred from the mere fact of differences in *treatment*. *See Arlington Hts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Teamsters*, 431 U.S. at 335-36 n.15. Unlike the hate crime law which directly punishes racial motive, it is the objectively verifiable conduct that is the object of punishment under 42 U.S.C. § 2000e-2(a)(1), not the bigoted attitude *per se* of the employer. *See Teamsters*, 431 U.S. at 335-36 n.15 ("[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII").

Despite the fact that discriminatory motive is "critical" under a disparate-treatment analysis, a tight nexus exists between discriminatory motive and the conduct which makes 42 U.S.C. § 2000e-2(a)(1) the most narrowly tailored means of preventing discrimination in the workplace. Because no content-neutral alternative avenue is available for civilly remedying employment discrimination, 42 U.S.C. § 2000e-2(a)(1) is constitutionally permissible under the First Amendment.

2. As written, the Wisconsin hate crime law is invalid because on its face it punishes the discriminatory motive of the actor rather than directly protecting targeted victims.

The State also attempts to justify the criminalization of discriminatory motive under the hate crime law by likening it to state statutes, including WIS. STAT. §940.20(2) (1982), which provide greater penalties when a battery victim is a police officer. Brief of Petitioner at 29. The State is correct when it says that these laws do not facially offend the First Amendment, but the justification is not, as the State asserts, that "such batteries frequently demonstrate the offenders' contempt for law enforcement." *Id.* The State is unpersuasive when it argues that penalty enhancement for batteries

against police officers and for hate crimes are constitutional for the same reasons: "[b]oth are facially valid . . . for a deceptively simple reason. On their faces, neither type of law requires or authorizes the punishment of any protected First Amendment activity." *Id.*

As the Ohio Supreme Court observed, a statute enhancing penalties for assaults against police officers "passes First Amendment analysis because the *motive* or thought which precipitated the attack" is not punished as it is under the Wisconsin hate crime law. *Wyant*, 597 N.E.2d at 456. A legislature might impose a greater penalty for battering a police officer than for battering another citizen if it found that police officers, as a class, are more likely to be exposed to battery. *See Id.* at 455-56.

If Wisconsin wishes to protect the groups which are most often the target of violent conduct, the legislature could have drafted a statute that directly imposed greater penalties for crimes against targeted victims. For example, if the Wisconsin legislature had determined that certain types of crimes against the disabled were more prevalent than against the non-disabled, it may have enhanced the criminal penalty in those cases. Such a law would achieve the result intended by the State while, at the same time, satisfy the First Amendment because neither the *motive* nor thought precipitating the criminal act are separately punished. *See R.A.V.*, 112 S. Ct. at 2548 (prohibition of conduct directed against certain persons or groups would be facially valid). This statute would pass the scrutiny required under Equal Protection analysis if the State could convincingly demonstrate that the disabled were victimized by crimes more frequently than other groups. However, as written, the Wisconsin statute does not survive a First Amendment analysis because, on its face, it separately penalizes the discriminatory motive of a criminal defendant.

3. Federal laws criminalizing deprivations of constitutional rights under the color of state law are not analogous to the Wisconsin hate crime law.

The comparison of the Wisconsin statute to 18 U.S.C. § 242 (1969) proposed by the State's *amici* also is unpersuasive. *See* National ACLU Brief at 9-10 n.8. Section 242 provides that it is a

federal crime for anyone acting under the color of law to deprive another person of rights secured by the Constitution by reason of the person's color or race. This provision is distinguishable from the Wisconsin hate crime law in that it was enacted to enforce the Fourteenth Amendment and was directed only against activities of the state and of its authorized agents. *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Cooley*, 217 F. Supp. 417, 422 (D. Colo. 1963). The Wisconsin statute, in contrast, criminalizes the racial motivation of private citizens acting in a private capacity. The concerns under the Fourteenth Amendment, to prevent state or federal government action favoring or disfavoring persons on the basis of race, are not implicated by the Wisconsin hate crime law, nor is 18 U.S.C. § 242 relevant to a First Amendment analysis of the Wisconsin statute. Thus, any attempt to justify the criminalization of thought under the hate crime law by an analogy to this federal provision is unavailing.

4. The criminal penalty imposed by the hate crime law is qualitatively more severe than any sanction available under antidiscrimination laws.

As the State concedes, antidiscrimination laws are remedial in nature. They typically impose civil sanctions on violators and, on this basis, can be distinguished from the Wisconsin hate crime statute.[8] The Wisconsin law, in contrast, punishes the bigoted thought behind a criminal act and imposes an enhanced criminal penalty of up to five years because of the content of that thought. The civil sanctions imposed by antidiscrimination laws are qualitatively less harsh than the enhanced penalty imposed by the hate crime law; thus, more tolerance can be afforded them. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (this Court has expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences are less severe).[9]

[8] *See, e.g.*, Title VII, 42 U.S.C. § 2000c-6(a) (1981) (authorizing civil actions to be brought by the Attorney General when an individual is denied admission into a public college "by reason of race, color, religion, sex, or national origin); 42 U.S.C. § 2000d (1981) (authorizing civil relief when person is excluded from public benefit program on the ground of race, color, or national origin).

[9] *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 747-48 n.25 (1978) (distinguishing the more moderate civil sanctions imposed by the Federal Communications Commission from sanctions in the event of criminal prosecution).

Perhaps because the sanctions are less severe than those imposed by the hate crime law, alleged violators of antidiscrimination laws seldom raise First Amendment challenges to these laws.[10] Indeed, if employers could be imprisoned for up to five years for employment practices motivated by racist beliefs, instead of being made to pay back wages or enjoined from such practices, it is likely that such statutes would be subject to First Amendment challenge.

The State also attempts to show that antidiscrimination laws imposing criminal sanctions or allowing punitive damages upon a finding of ill will or spite support the validity of the hate crime law. Brief of Petitioner at 31-33. For instance, the State and its *amici* refer to 42 U.S.C. § 3631 (1985), which criminalizes violent actions or threats under the color of law against the housing opportunities of any person "because of his race, color, religion, sex, or national origin." Brief of Petitioner at 33; National ACLU Brief at 9. Neither the State nor its *amici* calls attention to the fact that such actions must be taken under the color of law in order to be sanctionable. Like 18 U.S.C. § 242, this provision does not apply to private conduct; thus it is not relevant to the validity of the hate crime law, which penalizes the discriminatory thought of private persons. Moreover, while 42 U.S.C. § 3631 provides that state actors who cause the death of another while interfering with housing may be imprisoned for life, it is clear that the penalty imposed is for the act of killing, not for the discriminatory motive of the state actor.

While conceding that the vast majority of antidiscrimination laws are remedial, the State suggests that, because punitive damages are available under federal and state fair housing laws and Title VII, the enhanced criminal penalty imposed by the Wisconsin statute is proper. Brief of Petitioner at 31-32. The provision of punitive damages upon a finding of ill will or spite is frequent in many civil causes of actions and cannot, simply because such damages are available in the context of antidiscrimination laws, justify the

[10] *But see, Voluntary Ass'n of Religious Leaders v. Waihee*, 800 F. Supp. 882, 890-91 (D. Haw. 1992). This is the only case found by the undersigned counsel in which a First Amendment speech challenge was brought against a state statute prohibiting employment discrimination on the basis of sexual orientation. However, the First Amendment issue was never reached because the court found that the plaintiffs' claim was not ripe.

criminalization of thought effected by the Wisconsin hate crime law. Although punitive damages may embrace factors such as the heinousness of the civil wrong, and are sometimes characterized as "quasi-criminal," they hardly compare to a criminal penalty separately imposed on the motive of an alleged perpetrator. The Wisconsin Supreme Court correctly observed that this additional criminal penalty for the actor's bigoted motive "directly implicates and encroaches upon First Amendment rights" in a fashion that the punitive damages available under antidiscrimination laws do not. *Mitchell*, 485 N.W.2d at 812.

V. CONCLUSION

For the reasons set forth above, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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